

SOUTH AFRICA / JUDGMENT

Henque 3833 CC v Bailie N.O and Others (3340/2020) [2025] ZAMPMHC 17 (31 January 2025)

[2025] ZAMPMHC 17

COURT

Middelburg High Court, Mpumalanga

BEFORE

Langa

CASE / FILE NUMBER

3340/2020

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Policy**IN THE HIGH COURT OF SOUTH AFRICA****MPUMALANGA DIVISION (MIDDELBURG****LOCAL SEAT)****CASE NO: 3340/2020****(1) REPORTABLE:****NO****(2) OF INTEREST TO****OTHER JUDGES: NO****(3) REVISED****DATE 31 January 2025****SIGNATURE****In**

the matter between: HENQUE 3833 CC
 APPPLICANT
 AND
 IAN RICHARD BAILIE N.O
 FIRST RESPONDENT
 THE SHERIFF FOR THE DISTRICT OF
 WITBANK
 SECOND RESPONDENT
 THE MASTER OF THE HIGH COURT,
 MPUMALANGA
 THIRD RESPONDENT
 THE EMALAHLENI LOCAL
 MUCICIPALITY
 FOURTH RESPONDENT

JUDGMENT

Coram Langa J

Introduction and Facts

- [1] This Application involves a SPLUMA certificate sought for the transfer of the property, a piece of land forming the subject of the sale, from the First Respondent to the Applicant. The Applicant, Henque 3833 CC, brought this application to compel the First Respondent, Ian Bailie N.O. to take the necessary steps to ensure that the Applicant can take control, ownership and occupation of this property, which it is common cause the Applicant purchased from the First Respondent on 25 February
2020. The Applicant further seeks an order that the First Respondent be ordered to pay the costs of the application on the scale as between attorney and client.
- [2] The First Respondent opposes the application and contends firstly that the relief sought has become moot since the First Respondent subsequently cancelled the agreement on 31 October 2022. The First Respondent contends further that alternatively it cannot pass the transfer as the Applicant has failed to perform in terms of the agreement.
- [3] It is common cause that the First Respondent is the duly appointed executor in the estate of the late Mr Clive Lynn. On 28 February 2019 the Applicant purchased a property from the estate in terms of a sale agreement for a purchase price of R800 000. The terms of the said sale agreement are common cause. In terms thereof the First Respondent became obliged to transfer the property into the Applicant's name upon the payment of the purchase price. The relevant clauses of the agreement provided for inter alia the following:
- Clause 3 provided that the First Respondent shall transfer the said property to the Applicant upon the payment of the agreed full purchase price;
- Clause 6.1.2 provided that the property was currently zoned for residential purposes only;

Clause 12 provided that the Applicant would not effect any alterations or additions to the property without obtain the prior written consent of the First Respondent.

Clause 13 provided that the Applicant acknowledged that it was aware that an application for the rezoning of the property to light industrial had been made to the relevant local authority and that it (the Applicant) would be liable for the costs of the rezoning application which would include inter alia the costs of the town planner application and publication fees etc.

- [4] The Applicant took occupation of the property on 1 March 2019 and paid the purchase price in instalments with the last payment effected on 29 July 2019. To this end Clause 13 provided that the Applicant acknowledged that it was aware that an application for the rezoning of the property to light industrial had been made to the relevant local authority and that the First Respondent as the Seller would be liable for the costs of the rezoning application which would include inter alia the costs of the town planner, application and publication fees. The Applicant as the purchaser on the other hand would be liable for any amounts which become payable to the Municipality for the provision of or upgrading of any services payable or any levy or charge payable as a result of the rezoning of the property.
- [5] The Applicant commenced with the alterations to ensure that the property id fit for a workshop. The First Respondent ostensibly paid the bulk contribution of R56 244. 88 into his trust account and later to the Municipality. It is common cause that this money was received by the First Respondent from the Applicant. As a conveyancer cannot transfer the property to the purchaser without a SPLUMA certificate, on 6 December 2019 the First Respondent applied to the Municipality for the first SPLUMA certificate. In a letter dated 22 January 2020 the Municipality indicated that the application was not supported by the Municipality's Building Control Section because there are illegal structures on the property to wit, a flat and carports. This occasioned an application to be made for the "as is" building plans incorporating the unlawful structures to be submitted to the Municipality.

- [6] Meanwhile it became apparent that the Municipality was not prepared to accept or approve the building plans unless all the rates, taxes and municipal service fees in arrears were paid by the owner, the First Respondent in other words. The First Respondent was not satisfied with the Municipality's decision and informed the Applicant that he intended taking action against the Municipality in order to correct the incorrect entries in its records relating to the property and to force it to accept and consider the plans. The Applicant was however not satisfied with the arrangement and insisted that the First Respondent take the necessary steps to effect the transfer otherwise it will take the matter to court. The Applicant insisted that the First Respondent pay the outstanding amounts and thereafter file a dispute for a refund in terms of the Local Municipality of Emalahleni Credit Control and Debt Collection Policy. When the impasse could not be resolved the Applicant launched this application on 3 November 2020.

- [7] The First Respondent meanwhile also brought an application against the Municipality on 3 December
2020. The application by the First Respondent was not opposed and on 12 April 2021 the court ordered the Municipality to accept and consider for approval such plans that are required for the issue of a SPLUMA certificate. Subsequent to the order the Applicant submitted the building plans and application for the relaxation of the building line which were approved in October 2021.
- [8] The First Respondent thereafter filed another application for a SPLUMA certificate which was rejected on the basis that the Applicant was conducting business on the property in violation of the zoning of the property.

The Applicant's contentions

- [9] In short, the Applicant contends that it complied with its contractual obligations and that the First Respondent failed to do so. The Applicant alleges that the Municipality refuses to transfer the property because of a number of reasons one of which is the failure by the First Respondent to pay the bulk services in full.
- [10] The Applicant contends further that another reason is the First Respondent's failure to comply with the by-laws and refers to the letter from the Municipality to the First Respondent dated 11 November 2022 and signed on 11 November 2022 where the former informs the latter that it could not effect the transfer because of the First Respondent's failure to comply with the by-laws. In the letter the Municipality states the reasons as follows:

"The Spatial Planning section did not support the application. The Seller has not complied with the provisions of section 86 (e) of the Emalahleni Spatial Planning and Land-Use Management By-Law, 2016. In that the affidavit submitted by the Seller indicated, under oath, that there is no land development application applicable to the property, however council approved a rezoning application for the property on 14 January 2020. In terms of the resolution, there are conditions of approval which have not been complied with by the Seller. In accordance with section 86 (e) as mentioned above, conditions of approval must be complied with before the transfer of any erf may occur. Therefore, a section 86 certificate cannot be issued.

- [11] The Applicant relies on this response by the Municipality in its insistence that the First Respondent has failed to take the necessary steps to ensure that the transfer of the property takes place. Despite the above, the Applicant avers that 9 months later in August 2023, the Municipality issued another notice to the First Respondent stating that it cannot issue the required SPLUMA certificate because of the following reasons which it alleges all show that the First Respondent is the cause of the problem:
1. The bulk contribution payable was not paid by the owner of the property;
 2. The restrictive title deed conditions must be removed by the owner of the property;

3. Maps must be submitted by the town planners to be appointed by the owner.

[12] The Applicant contends therefore that in terms of the agreement and the by-laws, the First Respondent carries the duty to comply with the duties of the owner of the property and that these cannot be passed on to the Applicant as the purchaser. The Applicant contends therefore that the First Respondent has failed to raise a bona fide defence and that his defence should be dismissed.

The First Respondent's Contentions

[13] As stated above, the First Respondent concedes that it had the obligation to obtain the necessary SPLUMA certificate and filed as number of applications with the Municipality were rejected as a result of the Applicant's unlawful conduct. It contends that as a result of this unlawful conduct, which constituted a breach of the agreement, the First Respondent eventually cancelled the agreement.

[14] Firstly, the First Respondent contends that on 9 February 2020 the Municipality recorded that the SPLUMA certificate could not be issued as illegal structures had been erected on the property by the Applicant in breach of the agreement and in contravention of the by-laws. As a result, it had to apply for the relaxation of the building line and lodge new plans which was approved on 20 August 2021 and 7 October 2021 respectively.

[15] Secondly, the First Respondent contends that on 25 November 2021 the Municipality rejected its second SPLUMA application because of the Illegal Land Use of the property by the Applicant which was not in line with the zoning thereof. The First Respondent contends that after he inspected the property and confirmed that the Applicant was indeed conducting business from the property, it afforded the Applicant time in writing until 30 July 2022 to rectify the problem otherwise the agreement would be cancelled. The Applicant failed to provide proof but provided a plan with an endorsement providing that the temporary structures are not more than 12 months on site unless extension granted. No proof was provided that an extension had been granted

when the endorsement would have lapsed on 21 July 2023.

[16] Notwithstanding, the First Respondent in a letter dated 06 July 2022 undertook to file another application while reserving its right to cancel the agreement without further notice. Meanwhile the Applicant's attorneys responded on 25 July 2022 stating that the issue of the alleged running of a business on the property and the plan for the residential property had been attended to and cleared with the Municipality and that the latter was ready to issue the SPLUMA certificate.

[17] The First Respondent however states that on 20 October 2022 the Municipality again rejected the application citing the reason that the property is being used for industrial purposes whereas the applicant had not finalised the land use application. On 31 October 2022 the First Respondent informed the Applicant that the application had been rejected for this reason and that he was accordingly cancelling the agreement as the Applicant was failing to

remedy the breach which was brought to its attention. The First Respondent states that on 09 January 2023 he received a letter dated 15 December 2022 from the Municipality confirming that the SPLUMA certificate would not be issued.

Issues in dispute

- [18] The parties are not in agreement regarding the issues for determination in this matter. According to the Applicant the issues in dispute are whether the First Respondent as the owner of the property is obligated to do the following:
1. Pay the bulk service contributions or alternatively provide proof of payment thereof;
 2. Remove restrictive title deed conditions under Title Deed T124565 prohibiting the industrial rights of the rezoning of the property as per condition 1 of Resolution E.10/20;
 3. Appoint a professional town planner to submit Map 3's; and
 4. Whether the complaints raised by the Municipality previously are relevant to the reasons why the transfer cannot be effected.
- [19] The First Respondent suggests that the issues to be determined are firstly, whether the Applicant is entitled to the order sought where the Applicant has persistently breached the terms of the sale agreement, and the First Respondent has cancelled same; Secondly whether, if the court finds that the agreement was not cancelled, the parties agreed that the Applicant assumed the obligation to attend to the conditions provided for in the rezoning approval pursuant to their agreement.
- [20] I am of the view that given the First Respondent's defence that he has cancelled the agreement as a result of the alleged breach, the court has to first determine the validity of the cancellation. If the court finds that the agreement is still valid, the court must then deal with the question of the conditions attaching to the approval of the rezoning and consequently who is obligated to comply therewith. Based on the First Respondent's contentions, it further has to be determined whether the Applicant played any role in the rejection of the applications.

Discussion and analysis

- [21] It is common cause that the First Respondent had to first obtain a section 86 Certificate of the SPLUMA By-Laws, 2016, (the SPLUMA Certificate) from the Emalahleni Local Municipality in order to effect the transfer. In terms of section 86(2), the Municipality in turn can only issue a certificate to transfer a land unit after the owner has furnished it with inter alia a conveyancer's certificate confirming that the funds due by the transferor have been paid, proof that the land use and buildings constructed on the land comply with the requirements of the land use scheme and proof that the conditions of approval have been met.

The SPLUMA applications

- [22] It is not disputed that the First Respondent did file applications with the Municipality for the issuance of the SPLUMA certificate on a number of occasions and the applications were rejected. As no SPLUMA certificate was available the transfer of the property could not be effected.
- [23] It is important to look at the reasons given by the Municipality in refusing the SPLUMA applications filed by the First Respondent on the different occasions. The first application was filed on 6 December 2019 and rejected 9 February 2020 on the basis that there is an illegal flat as well as illegal carport on the property. This is confirmed in the letter dated 21 January 2020 from the Municipality with official date stamp of 22 January 2022. (my underlining). It is not disputed that these structures were erected by the Applicant and that in that process the building lines were not complied with as the buildings were within two (2) meter building line set by the building regulations. As stated above the issue necessitated the preparation of the “as is” plans and the application for approval of the relaxation of the building line.
- [24] After the approval of the plans and the relaxation of the building line, on 3 November 2021 the First Respondent filed the second application for a SPLUMA certificate. This application also suffered the same fate as the first. It was also rejected by the Municipality but this time because there is an illegal Land Use (Business) on the property that is not in line with the zoning of the property. This is clear from the letter dated 25 November 2021 from the Municipality. (my underlining).
- [25] Although the First Respondent also alleged that he inspected the property and found that the Applicant conducted business thereon, this was denied by the Applicant. It is however common cause that the property had been zoned as Residential 1 and the Applicant was aware thereof at the time of the conclusion of the agreement. As he did not agree that he conducted business on the property, after the second rejection the First Respondent advised the Applicant to take measures to reverse the Municipality’s decision which otherwise stood as a valid administrative decision until overturned.
- [26] The Applicant did not challenge the decision as advised but instead informed the First Respondent that the issue had been taken care of with the municipal official, one Mr Silinda, who was showed that there was no trading on the property. The Applicant through its attorneys stated that after their interaction with the officials from the municipality there should be no issue in the issuing of the certificate this time around.
- [27] The First Respondent then filed the third SPLUMA application on 24 August 2022. The Municipality however again rejected this application on the basis that the property is being used for Industrial purposes however the applicant did not finalize the Land Use application. This is apparent from the email communication dated 20 October 2022 from one of the officials of the Municipality.

- [28] The First Respondent contends in the supplementary affidavit that the Applicant was the cause of the rejection of the applications for a SPLUMA certificate and that as a result thereof he could not give transfer of the property to the Applicant. In essence the First Respondent contends that the Applicant was the reason why the SPLUMA certificate could not be issued by the Municipality because the property was being used for a wrong purpose. I will revert to this application and the reasons for the rejection thereof in the ensuing paragraphs when dealing with the cancellation of the agreement and the effect thereof.
- [29] It however appears on the face of it that based on the reasons provided by the Municipality, the Applicant contributed to or caused the rejection of the applications. It must be borne in mind that it was never denied that the Applicant took occupation of the property on 1 March 2019 after the conclusion of the agreement. Taking this into account, the only conclusion that can be reached is that when the three SPLUMA applications were made and rejected the Applicant was in occupation of the property.
- [30] It must accordingly be accepted that the illegal flat and carports were developed or brought onto the property by the Applicant who was in possession thereof. Likewise, that there is an illegal Land Use (Business) on the property that is not in line with the zoning of the property can only be attributed to the Applicant as it was during his occupation of the property. Although this latter reason is denied by the Applicant, he did not do anything to challenge this decision by the Municipality. Similarly, the last reason advanced by the Municipality that the property is being used for Industrial purposes should also be attributed to the Applicant who was in possession or occupation of the property at the time. As alluded to above the last ground is mired in some controversy and will be dealt with in more detail below. However, based on the above, one may easily conclude that the Applicant was the cause of the rejection of the SPLUMA applications and therefore the cause of the First Respondent's

failure or inability to transfer the property. For that reason, it may be concluded that the First Respondent was entitled to cancel the agreement and that the cancellation is therefore valid. The matter is however not as simple as all that as will become apparent below.

The Rezoning conditions

- [31] Having dealt with the SPLUMA applications and the reasons for the rejection thereof, I will now turn to the ultimate reasons relied on by the Applicant in its contention that the First Respondent is the party who should take steps to facilitate the granting of the section 86 application. It is important to note that although the Municipality initially stated on 20 October 2022 that the last application was rejected because there was trading on the property which was contrary to the rezoning of the property, the Municipality however issued another notice on 15 August 2023 stating a different ground. These reasons for the rejection of the application contained in this letter dated 15 August 2023 signed on 18 August 2023 by the Executive Director; Development Training and read as follows:

1. The rezoning (Amendment Scheme 1[...], Witbank Extension 8) must be proclaimed in the Mpumalanga Provincial Gazette for the rights to come into effect. Up to date this could not be done by the municipality as the following conditions of approval was (sic) not adhered to:

1.1 The bulk service contributions payable in terms of the approval of the rezoning as contained in condition (2) of the resolution E. 010/20 dated 14 January 2020, was not paid by the owner of the property;

1.2 The restrictive title deed conditions contained in the Title Deed T12456/03 prohibiting the 'Industrial 1' rights granted in terms of the said rezoning, must be removed as stipulated under condition (1) of the resolution E.010/20 dated 14 January 2020. This was not done by the owner;

1.3 Maps 3's must be submitted by a professional town planner for the proclamation of the relevant Amendment Scheme. Such person must be appointed by the owner of the property.

[32] The Applicant contends that the First Respondent's failure to comply with the by-laws is the last and latest reason advanced by the Municipality for the rejection of the SPLUMA application. The Applicant contends further that these reasons supersede the old reasons advanced by the Municipality and argues this notice makes it clear that it is the First Respondent, as the owner, who is responsible to comply with the conditions of approval for the rezoning application. The Applicant therefore asserts that the duties set out above can only be complied with by the owner in terms of the agreement and the by-laws.

[33] It is common cause that the Municipality resolved on 24 January 2020 to approve the rezoning the property from "Residential 1" to "Industrial 1". This resolution was subject to a number of conditions most of which relate to environmental and building requirements. The relevant conditions include inter alia that the bulk contributions of R56 244.87 are payable within 60 days of the receipt of the approval letter and that the Map 3's be submitted for signature of the Assistant Manager Spatial Planning within 30 days of the date of this letter;

[34] It is clear from the 15 August 2023 notice that the rezoning and the conditions attaching thereto are the responsibility of the First Respondent as the owner. As stated above, these include in particular the payment of the bulk service contributions, the removal of the restrictive condition prohibiting the rezoning to Industrial 1 as well as the submission of the MAP 3's by a professional town planner. The Municipality states categorically in paragraph 2 of this letter that that The owner of the property is responsible for complying to (sic) the conditions of approval for the rezoning as stipulated under

resolution E.010/20 dated 14 January 2020, unless specified differently in terms of another agreement entered into by the owner.

[35] While the First Respondent acknowledges that in terms of the agreement and by-laws he is obliged to transfer the property to the Applicant, he however denies the Applicant's contention that he is responsible for the rezoning of the property from "Residential 1" to "Industrial 1". Consequently, he also denies that he is the responsible party to comply with

the rezoning conditions as set out by the Municipality. The thrust of the First Respondent's contention and defence is that the Applicant contractually assumed responsibility for some of the conditions as it was already in occupation of the property and was therefore the only party which could provide information to meet those conditions.

- [36] Given the First Respondent's defence(s), the main question to be decided here is in my view whether there was an agreement between the parties that the Applicant will assume responsibility of seeing to it that the rezoning requirements are met. It is important to note that although the Municipality states that it is the owner's responsibility to comply with the conditions, it however also recognises that an agreement may be reached between the parties providing otherwise.
- [37] It is trite that one of the essentials of a contract is that there must be a consensus between the parties regarding the contract for it to be valid. In the context of this case, the relevant question is whether there was a consensus between the Applicant and the First Respondent that the former will assume the obligations emanating from the rezoning resolution.
- [38] As stated above, the rezoning was without doubt originally the obligation of the First Respondent according to the agreement and the by-laws. The First Respondent however relies on the alleged agreement reached with one Mr Prinsloo of the Applicant to shift this responsibility to the Applicant. The crux of the First Respondent's case is that on 21 July 2020 he held a meeting with Mr Prinsloo regarding the rezoning of the property. He suggested to Mr Prinsloo that in view of the fact that the conditions relate to the development and use of the property, the Applicant should attend to the finalization of the rezoning which Mr Prinsloo agreed to. The First Respondent contends that he further confirmed the said agreement by way of a letter dated

23 July 2020 directed to the Applicant. In paragraph 1 of that letter the Applicant is informed that "You are under obligation to comply with all of the requirements stipulated by the Emalahleni Local Council for the rezoning of the above property." However, in response thereto in a letter dated 2 September 2020, the Applicant's attorneys state inter alia the following in paragraph 4 thereof:

4. As to your suggestion that our client must comply with the requirements of the Emalahleni Local Council, we confirm the following:
 - 4.1. This has already been completed quite a while ago, by the Town Planner, Linds Herringer;
 - 4.2. However, as correctly stated in your letter dated 31.7.2020, paragraph 3, the Council will not accept the documents until the outstanding amounts due to the Council have been paid.
 - 4.3. The time of lodging is no problem. It has been taken care of by Mrs Herringer.

In paragraphs 9 and 11 it states the following:

9. It is obvious that the seller is in breach in not paying the council and not transferring the property into the name of the Purchaser. The excuses of re-zoning are not applicable because that has been taken care of and complied with. (my underlining).
11. Our instructions are as follows:
- 11.1. To demand that the Executor of the estate immediately sort out the problem of any outstanding amounts with the Emalahleni Local Council and secure a clearance certificate to assist in the transferring of the property;
- 11.2. This will enable the Purchaser to lodge the application for re-zoning and to get SPLUMA in order, (my underlining).
- [39] Regarding the removal of the restrictive condition the First Respondent refers further to a letter dated 7 April 2022 by the Applicant's attorneys in which the following is stated. We confirm that our client has now proceeded to appoint Laurette Swarts from the firm Korsman & Associates to assist with the removal of the restrictive condition in terms of section 67. This is followed by a letter dated 19 April 2022 from the same attorneys in which the state the following regarding the restrictive condition in paragraph 6;
6. Although the removal of the restrictive condition is not the duty of our client as the buyer of the property, but indeed the duty of the seller, our client has instructed Korsman & Associates to oversee the process to speed up the process and to mitigate the damages suffered by our client. (my underlining)
- [40] Based on the above letters and paragraphs referred to, the First Respondent contends that it is clear that the parties agreed that the Applicant will deal with the conditions laid down in respect of the rezoning application. He contends further that the Applicant acknowledged its obligation to attend to the rezoning conditions and to remove the restrictive condition and to this end published the required notice.
- [41] However, it is important to note that in its further affidavit the Applicant denies that there was an agreement between the parties providing that the Applicant will assume the responsibilities of the First Respondent in terms of the agreement and by-laws. The Applicant asserts that it endeavoured to, without being obliged to do so, "usurp certain the (sic) obligations and ensure the removal of the restrictive conditions and submission of MAP 3's."
- [42] I must state that considering the above including the letters referred to by the First Respondent, nowhere in these letters from the Applicant does the latter in clear terms confirm that it is assuming the responsibility to comply with the rezoning conditions as alleged by the First Respondent. All that the Applicant says is that it confirms for instance that the requirements of the Municipality have been completed quite a while ago, by the Town Planner, Linda Herringer. It further says that the rezoning has been taken care of and complied with. It does not however confirm that it is assuming or has assumed any obligation(s) as suggested by the First Respondent. The following paragraph is telling as it

responds to the First Respondent's assertion that the Applicant is "... under obligation to comply will all of the requirements stipulated by the Emalahleni Local Council for the rezoning of the above property." The Applicant says "As to your suggestion that our client must comply with the requirements of the Emalahleni Local Council, we confirm the following:

4.1. This has already been completed quite a while ago, by the Town Planner, Linds Herringer;"

- [43] This paragraph and others relied on by the First Respondent in my view do not constitute sufficient evidence to ground the conclusion that the Applicant assumed responsibility to comply with the rezoning conditions. Furthermore, concerning the allegation that the Applicant assumed the obligation to remove the restrictive condition, it is clear from the letter dated 7 April 2022 from the Applicant's attorneys that the Applicant undertook to assist with the removal of the restrictive condition. The same with the submission of the Map 3's.
- [44] In addition, although in paragraph 11.2 of the letter the Applicant says "This will enable the Purchaser to lodge the application for re-zoning and to get SPLUMA in order," it is however clear from the letter dated 13 September 2022 from the Applicant's attorneys that they are prepared to assist the First Respondent with the further SPLUMA application. The Applicant is nowhere saying that he is taking over the First Respondent's obligations in this regard. Likewise, the statement by the Applicant that the "excuses of the rezoning are not applicable because that has been taken care of and complied with' cannot by any stretch of imagination be interpreted as evidence that the Applicant had assumed responsibility to comply with the conditions.
- [45] Thus, although the Applicant did not pointedly deny that he is under the obligation to comply with the rezoning applications, it is clear from some of these letters that the Applicant in its mind was merely assisting the First Respondent in the process of obtaining the SPLUMA certificate. It does not appear from any of these letters that the Applicant confirmed that it accepts responsibility for these obligations as alleged by the First Respondent. It cannot therefore be said that the Applicant assumed responsibility to meet the rezoning conditions as alleged by the First Respondent.
- [46] Consequently, based on the above, and in the light of the denial thereof by the Applicant, I find no evidence of a consensus between the parties for the Applicant to assume the First Respondent's duties in relation to the rezoning condition. In the light of the foregoing facts, the conclusion that can be arrived at is that the Applicant voluntarily and not contractually assumed the duty to remove the restrictive condition and to submit the Map 3's. However, by assisting with the removal of the restrictive condition and submission of the Map 3's, and even paying the fees therefore, the Applicant cannot be said to have contractually assumed the First Respondent's duties as the owner. There is therefore not enough evidence to establish that an agreement was reached absolving the First Respondent from the duty to comply with these conditions even if the Applicant was in occupation of the property. In any event, given the nature of the conditions, the fact that the Applicant was in occupation could

not constitute an obstacle for the First Respondent to comply therewith. There is accordingly not enough evidence on the basis of which to conclude that the Applicant assumed responsibility to comply with the conditions. In the light thereof, I find that the First Respondent's defences stand to be dismissed.

Payment of bulk contribution services

[47] I now turn to the issue of the payment of the bulk contribution of R56 244.88 for engineering services. This is also cited in the Municipality's letter of 15 August 2023 as one of the reasons why the application section 86 application could not be supported. The First Respondent contended in 2020 already that same had been paid to the Municipality. However, according to the Municipality's letter of 15 August 2023 the bulk contributions payable in terms of the rezoning was not paid by the owner. The First Respondent however referred to a statement of account issued by the Municipality for July 2020 reflecting the payment of R56 244.88 made on 14 July

2020. It would seem that despite the First Respondent having paid this amount, the Municipality still stated on 15 August 2023 that this amount was still outstanding. This is obviously incorrect. In this respect the contention that the First Respondent failed to comply with this condition cannot be supported as there is proof that the R56 244.88 was paid to the Municipality.

Cancellation of the agreement

[48] I now turn to the purported cancellation of the agreement by the First Respondent communicated to the Applicant by way of the letter dated 31 October 2022 after the rejection of the third SPLUMA application by the Municipality. The Applicant challenged the cancellation which he viewed as a repudiation and refused to accept it. It is important at this stage to examine the reasons for the rejection of the application closely as they have weight on whether or not the cancellation is valid.

[49] For that purpose I revert to the reasons cited in the First Respondent's letter of October 2022 which is that the application was rejected as the property is being used for Industrial purposes contrary to the present zoning of the property. This is also clear from the email dated 20 October 2022 from one Dudu, presumably of the Municipality, who states that the reason for the rejection is that the property "is being used for Industrial purposes however the applicant did not finalize the Land use application". This is a very clear and specific reason based on the illegitimate use of the property.

[50] As stated in the preceding paragraphs it is common cause that the latest notice from the Municipality in terms of section 86 concerning the third SPLUMA application states that the SPLUMA application has been rejected as the Seller (First Respondent) has failed to comply with the Act by stating under oath that there is no land development application applicable to the property whereas the rezoning had been approved subject to conditions to be complied with by the seller before the erf can be transferred. The essence of this reason was

that the seller failed to comply with the conditions of the approval of the rezoning application.

- [51] In a response dated 30 November 2022, the First Respondent took issue with this latest decision by the Municipality arguing that the Council misconstrued the provisions of section 86(2)(e) which provides for conditions of approval which must be obtained before the transfer of the erf. He contended further that there are no outstanding conditions of approval of the erf in question and that the conditions of approval in the Council's letter dated 14 January 2020 relate to the re-zoning of the property and not the transfer thereof. He then requested the Municipality to revisit the matter and furnish full and proper reasons why the SPLUMA certificate cannot be issued. The Municipality however refused to change its decision.
- [52] It is clear that there is a misunderstanding or dispute between the First Respondent and the Municipality over this issue. However, what is now significant is the latest or last reasons provided by the Municipality on 15 August 2023 which are not wholly consistence with the reasons given earlier 20 October 2022. In October 2022 the reason was the use of property before the finalization of the land use and on 15 August 2023 it was the failure to comply with the rezoning conditions.
- [53] No mention is made by the Municipality in the latest notice dated 15 August 2023 that the application was not supported because the Applicant used the property for an Industrial purpose before the finalization of the land use application. It is categorically stated that it is as a result of the failure to comply with the rezoning conditions. From these facts it appears to me that the First Respondent cancelled the agreement on the basis of a wrong reason advanced by the Municipality. It can therefore be safely accepted that the problem cannot be attributed to Applicant this time around given the inconsistent information communicated by the Municipality. In any event, it would seem that the reasons contained in the last notice are the final reasons for the rejection of the application. Given what I have stated above in relation to the rezoning conditions and whose responsibility it was to comply therewith, I have to find that the Applicant was not the reason why the SPLUMA application was rejected.
- [54] Coming back to the agreement, the cancellation thereof can only be found to be valid if the Applicant breached the agreement as alleged and the First Respondent himself was not responsible for the rejection of the application for a SPLUMA certificate. It is clear from the First Respondent's letter of cancellation that the reason for the cancellation is that the Applicant used the property for Industrial purposes contrary to the present zoning thereof which is Residential. This is in essence the alleged breach relied on by the First Respondent as the basis for the cancellation of the agreement.
- [55] It is however now clear that the reason for the rejection relied on by the First Respondent is not what the Municipality states in the notice of 10 November 2022 or 15 August 2023. As is now clear from the last notice the rejection of the last SPLUMA application based on which the agreement was cancelled was because of non-compliance with the rezoning conditions

of approval and not unlawful use of the property. The notice clearly states that the First Respondent was responsible for complying with these rezoning conditions. The letter of 10 November 2022 and the Notice of 15 August 2023 are silent on the issue of the Applicant trading on the property. Consequently, the cancellation of the agreement was based on an incorrect ground. It should accordingly be found to be invalid and of no force and effect. Accordingly, the First Respondent's defence that the relief

sought in the notice of motion is moot cannot be countenanced. The finding that the cancellation was invalid in essence means that the Applicant is entitled to enforce the agreement.

Conclusion

- [56] In conclusion, as stated in the preceding paragraphs, the notice dated 15 August 2023 states that the rezoning and compliance with the conditions attaching thereto is the responsibility of the First Respondent as the owner of the property. This is not per se denied by the First Respondent. The sole reason the First Respondent denies this responsibility is that the Applicant contractually assumed the responsibility to do so. For the reasons given above, this defence has been rejected.
- [57] The First Respondent has not succeeded in establishing that there was such an agreement providing for the Applicant to take over the obligations of the First Respondent. No consensus between the parties was established in this regard. It was necessary for the Respondent in order to succeed with his defence to establish that there was a consensus between him and the Applicant that the latter will assume the responsibilities which otherwise resort with the First Respondent. Absent evidence of such a consensus between the parties, it cannot be found that such agreement has been established. In the light of the above, the First Respondent's defences have to be dismissed, and the application be granted.

Costs

- [58] Concerning the costs, the general rule is that costs follow the result. I do not find any reason in this matter for deviation from the rule. The First Respondent shall therefore pay the costs of this application. Regarding the Applicant's request that costs on a higher scale be considered I am not persuaded that a case has been made for such costs. The costs will therefore be party and party costs on Scale B.

Order

- [59] In the result I make the following order:
1. The First Respondent is ordered to take all the necessary steps to pass the transfer of the following property to the Applicant: to wit Erf 1[...] Witbank, Witbank Extension 8, Registration Division J.S. Mpumalanga: situated at 3[...] V[...] B[...] Street, Witbank;

2. Should the First Respondent fail to take all the necessary steps to pass the transfer of the property to the Applicant, the Second Respondent, the Sheriff for the District of Witbank, is authorised and ordered to take such steps on the First Respondent's behalf in order to ensure that the property is transferred to the Applicant;
3. The First Respondent is ordered to pay the costs of the application on party and party Scale B.

MBG LANGA

JUDGE OF THE HIGH COURT

MIDDELBURG

Appearances

For the Applicant: Advocate J Sullivan For the First Respondent: Advocate AN Kruger Date of hearing: 05 September 2024 Date of judgment: 31 January 2025

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be the 31 January 2025 at 12h00.

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